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IN THE

Supreme Court of the United States

October Term, 1943.

No. 189.

THE CONNECTICUT LIGHT AND POWER COMPANY,
Petitioner,

v.

THE FEDERAL POWER COMMISSION,
Respondent.

BRIEF FILED ON BEHALF OF THE CONNECTICUT PUBLIC UTILITIES COMMISSION AND THE NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS, AS AMICI CURIAE, IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI.

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August 23, 1944.

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OPINIONS BELOW.

The opinion of the Federal Power Commission, F. P. C. Opinion No. 75, May 15, 1942, (R. 63) is reported in 44 P. U. R. (NS) 170. The opinion of the Court of Appeals for the District of Columbia (R. 1170) is reported in 141 F. 2d. 14.

PRELIMINARY STATEMENT.

The Connecticut Public Utilities Commission is an agency of state government of the State of Connecticut, existing under the provisions of the laws of the State of Connecticut, and having jurisdiction over electric generating, transmission and distribution companies operating within the State of Connecticut.

The National Association of Railroad and Utilities Commissioners is a voluntary Association embracing within its membership the members of the regulatory commissions and boards of the several States of the United States except two, one of which has no State regulatory commission.

By the constitution of the Association, the President of the Association, and the Executive Committee, or either of them, may direct the General Solicitor to appear on behalf of the Association (as distinguished from a particular commission represented in its membership) in any proceeding pending before any court or commission in which, in the judgment of such President or Committee, appearance on behalf of the Association should be made. This brief is offered for filing on behalf of said Association by direction of the President in the general public interest.

QUESTIONS PRESENTED.

(1) Where the only facilities carrying electric energy generated outside the state are owned and operated for the sole purpose of enabling the owner or operator of the same to make local distribution of such energy, is the Company,[1] by reason of such ownership or operation, a public utility subject to jurisdiction under the Act.[2] This

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[1] As used in this brief, "Company" means The Connecticut Light and Power Company.

[2] As used in this brief, "Act" means the Federal Power Act, Act of June 10, 1920, c. 285 (41 Stat. 1063), 16 U. S. C. 791-823, as amended by Act of August 26, 1935, c. 687 (49 Stat. 838), 16 U. S. C. 791a—825r.

question was not raised before the Commission,[3] where it appears to have been understood by all parties that transmission other than for local distribution must be shown in order to establish Commission jurisdiction. The question tried, accordingly, was whether the company was engaged in such other transmission. The Commission found that it was so engaged, and rested its assertion of jurisdiction on that finding. The Court below held the question whether the facilities were used solely for local distribution to be irrelevant, ruling that the "sole test of jurisdiction of the Commission over accounts is whether these facilities, 'local' or otherwise, are used for the transmission of electric energy from a point in one state to a point in another."

(2) Are transmission lines, substations and similar facilities carrying some energy from outside the state, but used only in the business of retailing energy to ultimate consumers; facilities used for the "transmission of electric energy in interstate commerce" as distinguished from facilities used for "local distribution" or "transmission of electric energy in intrastate commerce"? The Commission answered the question in the affirmative (R. 67-69) The Court below said that this question is "not relevant" and expressed no opinion.

(3) Does the fact that the Borough of Groton is a municipal corporation prevent The Connecticut Light and Power Company from becoming subject to the jurisdiction of the Commission by virtue of any of the transactions between the Company and the Borough? The Commission answered this question in the negative. (R. 78) The Court below did not answer it.

(4) Should the Groton situation be disregarded, in determining whether or not the Company is subject to the jurisdiction of the Commission, in view of the negligible amount of the Company's total electric energy that was

[3] As used in this brief, "Commission" means the Federal Power Commission.

involved? The question was not raised in the Commission proceeding. The Court below said no.

STATEMENT OF THE CASE.

The facts of this case, so far as necessary to be stated for the purpose of this brief, are as follows:

The territory served directly by the Company covers a substantial part of the State of Connecticut. The Company distributes electric energy in 107 towns, cities, and boroughs, which have a total population of approximately 660,000 not including about 130,000 served in the State of Connecticut by other companies purchasing substantially all of their electric requirements from the Company. (R. 86-87)

In an order dated May 15, 1942, the Commission determined that the Company was, during various specified periods since August 25, 1935,[4] and continues to be, a "public utility" subject to the jurisdiction of the Commission. (R. 63-82) The order requires the Company to comply currently with accounting requirements applicable to such public utilities.

This determination by the Commission was based upon two different kinds of operations by the Company. One of these, involving the Bristol, East Hampton, and Torrington-Winsted districts, related to the purchase of electric energy from other companies for local distribution. (R. 71) The other situation, involving the Groton district in Connecticut, related to the sale of electric energy by the Company to the Borough of Groton, which in turn sold part of the energy to another company which transmitted it from Connecticut to Fishers Island, New York. (R. 70)

The Court below held that each of these operations gave rise to Federal Power Commission jurisdiction, and the Commission order was sustained. Because of the different

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[4] Parts II and III of the Federal Power Act (Title II of the Public Utility Act of 1935) was approved August 26, 1935.

legal aspects of these two kinds of operations, the facts regarding them are separately stated below.

THE BRISTOL, EAST HAMPTON, AND TORRINGTON-WINSTED DISTRICT.

The Company supplied customers in the Bristol, East Hampton, and Torrington-Winstead districts only at retail, with one unimportant exception.[5] These districts were not, during the respective periods when the Commission found the facilities subject to its jurisdiction, connected with the main system of the Company.

For the Torrington-Winsted district the Company purchased energy from the Torrington Electric Light Company, which obtained its supply either from its own plant or from the Connecticut Power Company.[6] The electric energy which the Torrington Electric Light Company received from the Connecticut Power Company was supplied from the so-called C. P. lines.[7] The Commission found that the electric energy transmitted over the C. P. lines to the Torrington Electric Light Company and thence to facilities of the Company "regularly, frequently and over substantial periods of time" included electric energy in substantial amounts transmitted from Massachusetts. (R. 66-69)[8]

The electric energy from the C. P. lines which reached the Company's facilities in the Torrington-Winsted district were supplied from the 2,300 volt bus of the Torrington

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[5] The only exception is the sale of a negligible amount of energy to the Torrington Electric Light Company, generated in the Robertsville plant of the Company near Winsted. There was no claim that any of this energy found its way into interstate commerce. (R. 400, 404, 659, 660-661, 688-689)

[6] The Connecticut Power Company is a corporation entirely separate from the Company. (R. 975-976)

[7] The term "C. P. lines" is an abbreviation for "Connecticut Power Lines" the lines being owned by the Connecticut Power Company.

[8] The Company disputes this finding by the Commission and contends in its brief to this Court that the Court below erred in refusing to weigh the testimony as to jurisdictional facts. For the purpose of this brief only, Petitioners are assuming the correctness of this Commission finding.

Electric Light Company's Torrington substation. The Company maintained a substation at Torrington with facilities for raising voltage from 2,300 to 27,600 volts, a substation at Winsted with facilities for lowering voltage from 27,600 to 4,600 volts, and a 27,600 volt double circuit wood pole line 10 miles or more in length, between those two substations. (R. 68) The Commission found that these were facilities "for the transmission of electric energy . . . as distinguished from local distribution thereof" and that such facilities were used "for the transmission of electric energy in interstate commerce." (R. 68)

On June 17, 1941,[9] the Company ceased to receive electric energy from the C. P. lines for its Torrington-Winsted district. An admitted purpose for discontinuing this connection was to avoid being held by the Commission to be engaged in interstate commerce. (R. 73)[10] The Commission held that, from January 1, 1937 to June 17, 1941, the Company was, by virtue of its ownership and operation of the described facilities in this district, a "public utility within the meaning of that term as used in the Federal Power Act." (R. 68)

For the East Hampton district the Company purchased energy directly from the Connecticut Power Company. Delivery was taken at Pole 110 of the Connecticut Power Company's tap line leading from the C. P. lines which, as noted above, the Commission had held carried energy transmitted from Massachusetts. (R. 66) The Company maintained a substation at Leesville for reducing voltage from 13,800 volts to 4,600; substations at East Hampton,

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[9] The Commission instituted its show cause proceeding on January 7, 1941. The hearing before the Commission began on July 7, 1941.

[10] The Company had been a member of the Connecticut Valley Power Exchange prior to enactment of the Federal Power Act, but discontinued its membership before August 26, 1935. The Connecticut Valley Power Exchange, according to a Commission finding in this case (R. 66) and in *Hartford Electric Light Co.* v. *Federal Power Commission*, 131 F. 2d 953, certiorari denied, 319 U. S. 741, transmits electric energy in interstate commerce.

Colchester, Comstock Bridge, Collins Hill and Westchester for reducing voltage to 2,300 volts; and 13,800 volt lines connecting these substations to the facilities of the Connecticut Power Company at Pole 110. (R. 67) The Commission found that these were facilities "for the transmission of electric energy . . . as distinguished from local distribution thereof" and that such facilities were used "for the transmission of electric energy in interstate commerce." (R. 67)

On July 1, 1939, the Company severed its connection with the Connecticut Power Company at Pole 110, one of the considerations for doing so being its policy to avoid being held by the Commission to be engaged in interstate commerce. The Commission held that, from January 1, 1937, until June 30, 1939, the Company was, by virtue of its ownership, and operation of the described facilities in the East Hampton district a "public utility within the meaning of that term as used in the Federal Power Act." (R. 67)

For the Bristol district the Company purchased energy directly from the Connecticut Power Company. Delivery was, and continues to be, taken at the Company's substation in about the center of Bristol, Connecticut, from the Connecticut Power Company's tap line leading from the C. P. lines. (R. 68) At its Bristol substation the Company maintains leads from the aforesaid tap line, lightning arrestors, disconnects, oil circuit breakers, busses, step-down transformers, and appurtenant structures and facilities of the outdoor substation; a synchronous condenser and appurtenant facilities in the adjacent substation building; and facilities connecting the synchronous condenser with the outdoor substation facilities referred to above. The Commission found that these were facilities "for the transmission of electric energy . . . as distinguished from local distribution thereof" and that such facilities were used "for the transmission of electric energy in interstate commerce." (R. 69) The Company has not discontinued this connection with the C. P. lines. The Commission held that,

from January 1, 1937, "to the present time" the Company "was and continues to be, by virtue of its ownership and operation of such facilities, a public utility within the meaning of that term as used in the Federal Power Act." (R. 69)

GROTON DISTRICT.

From and including August 26, 1935 to the date of the hearing, the Company sold electric energy to the Borough of Groton, a municipal corporation, for resale. From and including August 26, 1935 to February 28, 1941, the Borough of Groton, continuously sold to Fishers Island Farms, Inc., and its successor, The Fishers Island Electric Corporation (which corporations are hereinafter referred to without distinction as Fishers Island) a substantial portion of the electric energy which it purchased from the Company. Fishers Island transmitted this electric energy from Connecticut and distributed and sold it at retail in the State of New York. (R. 64) The electric energy so transmitted to New York constituted about 1/5 of 1% of all the energy generated and received by the Company throughout the State of Connecticut. The Company had knowledge that part of the electric energy which it sold to the Borough of Groton was being resold to Fishers Island and transmitted outside the state. (R. 64).

When the contract with the Borough of Groton expired in 1940, the Company would not enter into a new contract while the Borough continued to sell to Fishers Island. This was in accordance with the Company's policy to avoid being held by the Commission to be engaged in interstate commerce. (R. 73) Fishers Island proceeded to construct its own source of power on Fishers Island. The connection between Fishers Island and the Borough of Groton was severed in February, 1941, thus terminating this flow of electric energy from Connecticut to New York. (R. 73, 1052-1053) The Commission found that from August 26, 1935 to February 28, 1941 the facilities used by the Company in conveying electric energy to the Bor-

ough of Groton, were facilities "for the transmission and sale at wholesale of electric energy in interstate commerce, and Respondent was, by virtue of its ownership and operation of such facilities, a public utility within the meaning of that term as used in the Federal Power Act." (R. 65)

SPECIFICATION OF ERRORS.

The Court below erred:

1. In affirming the order of the Commission determining the Company to be a "public utility" by reason of the ownership and operation of facilities in the Bristol district and determining the Company to have been, at stated times in the past, a "public utility" by reason of the past ownership and operation of facilities in the Torrington-Winsted and East Hampton districts.

2. In affirming the order of the Commission determining the Company to have been, at stated times in the past, a "public utility" by reason of ownership and operation of facilities in the Groton district.

REASONS FOR GRANTING THE WRIT.

(1) This is the first case adjudicated by a court calling for the determination of whether a company which *receives* energy from an interstate transmission line, for local distribution, is a "public utility" subject to Parts II and III of the Act. *Jersey Central Company v. Federal Power Commission*, 319 U. S. 61, involved the status, as a "public utility", of a company which *transmitted* electric energy, part of which thereafter found its way outside the state. *Hartford Electric Light Co. v. Federal Power Commission*, 131 F. 2d 953, certiorari denied, 319 U. S. 498, involved the status, as a "public utility", of a company which *generated* and *sold* electric energy at the point of generation for transmission in interstate commerce.

(2) Under the law, as laid down by the Court below, notwithstanding the reassurance attempted to be given therein, practically every operating electric utility in the United

States, of any consequence, will be within the reach of the jurisdiction of the Commission, if the Commission undertakes to assert jurisdiction. Such a result would bring extensive duplication and overlapping of state and federal regulation, an outcome which Congress clearly intended to avoid when it enacted the Act.

(3) The Court below held that "whether or not the facilities by which petitioner distributes energy from Massachusetts should be classified as 'local' is not relevant to this case." This view goes far beyond any contention which the Commission made before the Court. It is at least open to grave doubt whether this view of the law will be adopted by this Court—a doubt which will almost surely produce further litigation in other cases unless put at rest in this case by this Court.

(4) These questions are questions of substance and general importance relating to the construction of a federal statute. They have not been, but should be, settled by this Court. The misconstruction which the Court below has placed upon the Act should be corrected now by a decision of this Court, so that the Commission may understand and observe the limits of its jurisdiction; so that further unnecessary litigation may be avoided; so that local distributing companies may know what will be the legal consequences of their acts; and so that the States may be left undisturbed in the exercise of their proper powers, which Congress designed to preserve.

ARGUMENT.

I.

The Company is Not Now, and has Not Been a "Public Utility" Subject to the Jurisdiction of the Commission by Virtue of the Ownership and Operation of Facilities in the Torrington-Winsted, East Hampton and Bristol Districts.

A company owning and operating only facilities used solely in local distribution is not a "public utility" subject to Commission jurisdiction.

Until the Court below rendered its decision there had been no disagreement upon the principle that a company owning and operating only facilities used solely in local distribution is not subject to Commission jurisdiction. The Commission had not challenged this principle either in its findings and opinion or in its brief to the Court below. Indeed, the Commission based its decision, that the Company was a "public utility" subject to Commission jurisdiction, upon a finding that the Company owned and operated facilities used for transmission "as distinguished from local distribution thereof." (R. 67-69)

But the Court below waved aside any question as to whether the Company's facilities in these districts were or were not "facilities used in local distribution." The Court said that this "is not relevant to this case." The sole test of jurisdiction, said the Court, "is whether these facilities, 'local' or otherwise, are used for the transmission of electric energy from a point in one state to a point in another."

The Court below, in reaching this conclusion, first referred to the statutory language which, when read together, seemed to support the principle referred to above.[11] The

[11] The Court said: "Petitioner's argument runs as follows: It is not required to keep accounts unless it is a 'public utility' (Section 301) A public utility is any person who owns or operates

Court conceded that such a construction is a "grammatical possibility." But then the Court advanced three reasons why it reached a contrary conclusion: (1) To exempt companies operating only facilities used for distribution would "contradict the broad purpose of the Act to correct abuses of writeups, inflation of accounts and similar practices . . . "; (2) Section 201(b), as analyzed in the *Hartford* case, does not provide such an exemption; and (3) such exception would force acceptance of the artificial conception "that electricity is carried in little abstract buckets."

The primary purpose of the Act was not to correct abuses of writeups, inflation of accounts and similar practices, but to provide Federal regulation of the sale of electric energy at wholesale in interstate commerce. *Jersey Central Company* v. *Federal Power Commission, supra.* Where the Commission is given jurisdiction, under the Act, to regulate wholesale rates, that regulation is to include, among other things, the correction of these abuses. But there is nothing in the Act to indicate that the existence of the abuses would itself subject facilities to Commission jurisdiction. As was said in *United States* v. *Chase,* 135 U. S. 255:

> "We recognize the value of the rule of construing statutes with reference to the evil they were designed to suppress as an important aid in ascertaining the meaning of language in them which is ambiguous and equally susceptible of conflicting constructions. But this court has repeatedly held that this rule does not

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facilities subject to the *jurisdiction* of the Commission. (Section 201(e)). The Commission does not have *jurisdiction*, except as specifically provided, over facilities used in local distribution. (Section 201(b)) While the Act specifically provides for the keeping of accounts on facilities in local distribution it does not specifically provide for *jurisdiction* over such local facilities. (Section 301) From this it is argued that even though the energy which petitioner distributes comes from another state it is not a public utility under the jurisdiction of the Commission because the facilities which it owns are for local distribution."

apply to instances which are not embraced in the language employed in the statute, or implied from a fair interpretation of its context, even though they may involve the same mischief which the statute was designed to suppress. (citing cases)"

The Court below intimates, in this connection, that an interstate system could defeat the primary purpose of the Act by separating its local distribution system through "artificial corporate manipulation" unless the distribution system which receives interstate energy is also subject to federal regulation. But, bearing in mind that the primary purpose of the Act is the regulation of wholesale rates for interstate energy, it is at once apparent that segregation of the local distributing system could not possibly defeat or impair attainment of that primary purpose. By the time the local distributing company receives the electric energy the wholesale rate has been already incurred for services already rendered. No operation of the distributing system, nor any abuses arising from such operation, could possibly affect the wholesale rate.

Turning to Judge Frank's analysis of Section 201 (b) in the *Hartford* case (not concurred in by Judge Hand), relied upon by the Court below, we note that the conclusion is reached that the so-called "but" clause in that section does not reduce the authority conferred on the Commission over "all facilities" for "the sale at wholesale in interstate commerce," in the earlier part of the sentence, by excluding "facilities used for generation."[12]

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[12] Section 201(b), with the "but" clause italicized reads as follows:

"(b) The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission

It is to be observed that Judge Frank's analysis is confined solely to the question of whether *generation* facilities are subject to regulation. His reference to Section 201 (a) and most of the legislative history upon which he relies, is directed to that issue alone. But let us examine the legislative history directly bearing upon the question of whether facilities used for *local distribution* are exempt.

The background of this legisaltion should first be noted. In *Pennsylvania Gas Co.* v. *Public Service Commission*, 252 U. S. 23, this Court had held that the New York Commission had the power to regulate rates at which natural gas, transmitted directly from the source, of supply in Pennsylvania, is sold, by the same company, to consumers in the cities and towns of New York.[18] But in *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U. S. 83, state commissions were held constitutionally incapable of regulating wholesale rates for electric energy transmitted in interstate commerce. Congress desired to overcome this hiatus in regulation by providing Federal regulation of wholesale rates where interstate commerce was involved, *but to go no farther* since local distribution, even of energy which had crossed state lines, was fully

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or sale of electric energy, *but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.*"

[18] This case was later expressly disapproved to the extent that it conflicted with *East Ohio Gas Co.* v. *Tax Commission*, 283 U. S. 465. However, the principle announced in the *Pennsylvania Gas Co.* case to the effect that the mere fact that the service crossed a state line did not preclude state regulation, was not disapproved. This is shown by the later citation of the *Pennsylvania Gas Co.* case in support of that principle in *Illinois Gas Co.* v. *Public Service Co.*, 314 U. S. 498; *Jersey Central Co.* v. *Federal Power Commission*, *supra* (dissenting opinion of Mr. Justice Roberts); and *Federal Power Commission* v. *Hope Gas Co.*, 320 U. S. 591 (separate opinion of Mr. Justice Jackson).

subject to state regulation. This clear intent is apparent from a reading of the legislative history.

The Bill first presented was introduced in the Senate by Senator Wheeler as S. 1725, and in the House by Congressman Rayburn as H. R. 5423. In the bill as introduced, Section 201 read as follows:

> "Section 201 (a) The provisions of this title shall apply to the transmission and sale of electric energy in interstate commerce and to the production of energy for such transmission and sale, *but shall not apply to the retail sale of energy in local distribution.* The Commission shall have jurisdiction over all facilities for such transmission, sale, and/or production of energy by any means and over all facilities connected therewith as parts of a system of power transmission situated in more than one State, *except facilities for the retail distribution of electric energy*, or for the production or transmission of energy solely for the use of the producer or transmitter or the use of his tenants on property owned or controlled by him and not for resale. Every person who owns or operates facilities subject to the jurisdiction of the commission under this title and every person who controls, directly or indirectly, any such person shall be subject to the provisions of this title and title III. The term 'public utility' when used in this title and title III means any person who owns or operates such facilities.
>
> "(b) Electric energy shall be held to be transmitted in interstate commerce if transmitted from a State to any point outside thereof; or between points within the same State but through any point outside thereof; or from or to any place in the United States to or from a foreign country; but only insofar as such transmission takes place within the United States." (emphasis supplied)

It is plain beyond the possibility of question that the intent of the language just quoted was to exclude from the jurisdiction of the Commission "facilities for the retail distribution of electric energy". It is equally plain, that, under the quoted language, a local company distributing

electric energy from another state, by facilities used solely for local retail distribution, would not have been subject to Commission jurisdiction.

Upon the bill containing this language Committee hearings were held in each House. Objection was made to the broad sweep of the bill. The Senate Committee reported the bill in a new draft, as S. 2796. As reported and passed by the Senate, Section 201 read as follows:

> "Section 201. (a) it is hereby declared that the business of generating, transmitting, and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of that part of said business which consists of the transmission and sale of electric energy in interstate commerce and the generation of electric energy for such transmission and sale is necessary in the public interest. It is further declared to be the policy of Congress to extend Federal regulation to those matters which cannot be regulated by the States, and also to exert Federal authority to strengthen and assist the States in the exercise of their regulatory powers *and not to impair or diminish the powers of any State commission.*
>
> "(b) The provisions of this part shall apply to the transmission of electric energy in interstate commerce, to the sale of electric energy at wholesale in interstate commerce and to the production of electric energy for such transmission or sale, *but shall not apply to the retail sale of such energy in local distribution.* The Commission shall have jurisdiction over all facilities for such production, transmission, or sale of electric energy by any means and over all facilities connected therewith as parts of a system of power transmission situated in more than one State, *except facilities used only for the production or transmission of electric energy in intrastate commerce or in local distribution* or for the use of the producer or transmitter. Every person who owns or operates facilities subject to the jurisdiction of the Commission under this part shall be subject to the provisions of this part and the part next following." (emphasis supplied)

We point out that the bill, when introduced, exhibited the peculiar grammatical structure which appears in Section 201 (b) as enacted, in that a broad all-inclusive provision was limited and cut down by a "but" clause, as follows:

> "The provisions of this title shall apply to the transmission and sale of electric energy in interstate commerce and to the production of energy for such transmission and sale *but shall not apply to the retail sale of energy in local distribution.*" (emphasis supplied)

This "but" clause was plainly designed to reduce the effect of the preceding sentence by excluding from the Commission's jurisdiction sales of electric energy to consumers. Also we point out that the next following sentence contained an "except" clause for a similar purpose of exclusion. These first two sentences, with some changes in phraseology, were carried into Section 201(b) of S. 2796, the "but" form being retained in the first sentence, and the "except" form in the next following sentence. Among the exceptions stated in the "except" clause in S. 2796 were "facilities used only * * * in local distribution." It was this "except" clause which finally became the "but" clause discussed in the opinion below.

We submit that it must be apparent that when the Senate passed the bill there was no more occasion for including such facilities in the "except" clause than there was for retaining them in that clause when it had become the "but" clause. The grant to which the exceptions were stated was a grant of "jurisdiction over all facilities for *such* production, transmission or sale", with the "such" relating back to "the transmission (and) * * * to the sale of electric energy at wholesale in interstate commerce", in the first sentence of the paragraph. It is obvious, just as was stated in the opinion in the *Hartford* case, that "such facilities could not possibly be among those used for the interstate transmission or interstate wholesale sales"; *but it is just*

as obvious that in the bill as passed by the Senate they were named in the "except" clause with the design that they should be excluded from the Commission's jurisdiction. The purpose of the clause at that stage was not open to question.

The House, having held hearings on H. R. 5423 redrafted S. 2796, and passed the same in a new form. As so passed Section 201(b) read as follows:

> "(b) The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a state line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, *but shall not have jurisdiction over facilities used for generation of electric energy or over facilities used in local distribution* or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter." (emphasis supplied)

The House thus brought the first and second sentences of Section 201(b) into uniformity in grammatical structure by adopting the "but" form of exception for each. There is absolutely nothing to indicate that in doing this it intended that the "but" clause should have a different construction from that which it had in the bill as received by the House from the Senate. As we have just pointed out, it can not be doubted, that the "but" clause and the "except" clause were both used by the Senate as exception clauses.

When the bill went to conference between the two Houses, the second sentence of Section 201(b) was amended, so that such jurisdiction as was designed to be conferred by certain other sections should not be affected.

Section 201(b) took its final form, the second sentence being made to read as follows:

> "The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, *except as specifically provided in this Part and the Part next following*, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter." (emphasis supplied)

The purpose of this exception within the exception clause is obvious. By Sections 207, 301(a) and 308 of the bill, the Commission was specifically granted jurisdiction touching generation. Also in Section 202(c) and (d) it was provided that in time of war or of national emergency the Commission should have power "to require by order such temporary connection of facilities and such generation * * * of electric energy" as the Commission should find requisite in the public interest.

By these several sections, the Commission was specifically enabled to exercise jurisdiction for certain purposes under certain circumstances as respects generation, under Parts II and III. It was not intended that such jurisdiction should be affected by the exception incorporated in the "but" clause in Section 201(b). Accordingly, Congress inserted the exception within the "but" clause.

Such insertion, however, merely prevented the jurisdiction specifically granted, as aforesaid, from being brought into question. It did not have the effect of extending the grant of jurisdiction made in other parts of the Act. The grant of jurisdiction to impose accounting regulations, contained in Section 301(a), is confined to licensees and to public utilities. The distinguishing mark of a public utility remains the ownership or operation of facilities subject to the jurisdiction of the Commission. Under said Section

201(b) these are facilities for the transmission or sale of electric energy "not used in local distribution." Nowhere in the Act is jurisdiction "specifically provided" as to facilities so used. Accordingly the exception within the "but" clause can have no possible application in this case.

In the *Hartford* case Judge Frank also argued that, since the "but" clause also included facilities used for intrastate transmission, and since such facilities could not possibly be among those used for interstate transmission or interstate wholesale sales:

> "the 'but' clause becomes foolish if interpreted as carving out of the authority granted in the earlier part of the same sentence the facilities described in the 'but' clause . . ."

The general concept of "intrastate commerce" cannot be carved out of the general concept of "interstate commerce," since, as a general proposition, commerce is either wholly one or the other. But Congress was not here dealing with general concepts, it was dealing with statutory definitions. There is no doubt that Congress has power to divest interstate commerce transactions in which the states have an especial interest of such immunity from state regulation or control as might otherwise attach to them, by reason of their interstate character. A good example of this is the Webb Kenyon Act[14] divesting the interstate movement of intoxicating liquor of its character as interstate commerce and making it subject to state prohibition laws. The Constitutional power of Congress to do this, and of the states to exercise the control thus made available to them was sustained in *James Clark Distilling Co.* v. *Western Maryland R. Co.*, 242 U. S. 311.

It is plain that Congress intended to exclude from regulation under the Act some portion of the business of "transmission of electric energy in interstate commerce and the

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[14] Act of March 1, 1913 (37 Stat. 699, 27 U. S. C. 122), reenacted without change by Act of August 27, 1935, 49 Stat. 877.

sale of such energy at wholesale in interstate commerce," for, in Section 201(a), it expressly declared the need for such federal regulation to extend "only to those matters which are not subject to regulation by the states"; and it followed that declaration with an express provision, in Section 201(b), that the Commission "shall not have jurisdiction * * * over facilities used in local distribution."

Local distribution, in the absence of legislation providing for federal regulation, is "subject to regulation by the states." In the light of the language just quoted from the Act, and of the history of the Act, it seems altogether plain that it was the intent of Congress that such distribution, and facilities used therefor, should not be subject to the jurisdiction of the Commission under the Act. To hold that facilities used solely for local distribution are nevertheless subject to the jurisdiction of the Commission if they are used in transmitting electric energy moving in interstate commerce, in the broad sense of that term, is to deny effect to the express provision of Section 201(b).

The third point which the Court below relied upon to support its view that a company owning only local distribution facilities may be a "public utility" subject to Commission jurisdiction is that, otherwise it would be necessary to accept the artificial conception "that electricity is carried in little abstract buckets."

There would be merit in the argument on this point in the opinion below if the question here was the determination of the constitutional power of Congress under the Commerce Clause, or the constitutional limitations on the States, in the absence of Federal legislation. Perhaps neither the Commission nor the Courts could draw such an arbitrary line of demarcation in conflict with physical facts, if the issue was one of constitutional law. But the question is whether Congress has done so by statute. That is to be determined by examining the statute, its background and legislative history, not by comparing the speed or other physical properties of electricity with other forms of interstate movement.

There is nothing either unusual or abhorent in providing, by statute, an arbitrary line of demarcation between Federal and State jurisdiction. If Congress were to be denied this power then the determination by Congress of what is to be Federally controlled and what is to be State controlled could no longer be based upon a wise review of economic and political factors. It would be dependent alone upon the accident of physical facts. Congress has a perfect right to say: "Regardless of the characteristics of electrical transmission, the Commission's jurisdiction to regulate interstate transmission will end here, and state regulation may begin."

The facilities owned and operated by the company were only facilities used in local distribution or for the transmission of electric energy in intrastate commerce.

As developed in the previous paragraphs, a company which owns and operates only facilities used in local distribution is not a "public utility" subject to Commission jurisdiction. This would, for the same reasons, be true with respect to a company which owns and operates only facilities used for the transmission of electric energy in *intrastate* commerce. The Commission, in its findings and opinion, recognized this, but reached the conclusion that certain facilities of the Company in the three districts now under consideration, were facilities used for interstate transmission "as distinguished from local distribution". (R. 67-69) In making that determination the Commission applied this test:

> "* * * transmission, in our opinion, extends from the generator, where generation is complete, to the point where the function of conveyance in bulk over a distance, which is the essential characteristics of 'transmission', is completed and the process of subdividing the energy to serve ultimate consumers, which is the characteristic of 'local distribution', is begun." (R. 75)

Applying this test the Commission found that, although the Company took delivery of interstate energy at its own substation in about the center of Bristol,[15] and used that energy only for local distribution in Bristol, the Company owned facilities in Bristol which were used in the transmission of electric energy in interstate commerce "as distinguished from local distribution." The nature of these so-called interstate transmission facilities is described in the Statement of The Case, above.

The Commission test makes the statutory exemption of companies operating local distribution and intrastate transmission facilities meaningless. If any local distributing company receives interstate energy at a substation or anywhere else on its system, it must utilize facilities of the character operated by the Company at Bristol. When it does so the Commission says it is a "public utility" subject to regulation as such under the Act. Hence there could never be a case where a local distributing company, receiving interstate energy, would be exempt from Commission regulation. Yet that is exactly what Congress intended when it exempted such companies in Section 201 (b). The language denying jurisdiction over facilities used in local distribution can have had no other purpose, since an exemption of companies not using any energy which had crossed a state line would obviously have been unnecessary.

The only alternative to this is to say, as the Court did in the *Hartford* case, that the "but" clause is not an exemption carved out of interstate transmission and wholesaling companies, but is a "negatively worded confirmation of the Commission's jurisdiction, in certain circumstances, over the facilities mentioned in the 'but' clause." The conflict between this construction and the Congressional intent, as shown by the legislative history of the Act, has been discussed under the preceding section of this brief.

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[15] The Bristol connection with the C. P. lines was the only connection remaining at the time of the hearing. The Torrington-Winsted connection had ceased on June 17, 1941 (R. 73), and the East Hampton connection ceased on July 1, 1939. (R. 67)

The Commission based its test solely upon the physical facts of interstate transmission. Conceivably that transmission extends to the light bulb of the ultimate consumer. although the Commission, with no sacrifice of jurisdiction, has found such transmission to end short of that. But what we are here trying to determine is not the physical fact of *interstate transmission*, but the legislative intent as to the extent to which such transmission shall be subject to the jurisdiction of the Commission.[18] That the movement of electric energy may be *interstate transmission* without being *transmission in interstate commerce*, within the meaning of this statute, is demonstrable from the Act itself. Section 201 (c) reads:

> "(c) For the purpose of this Part, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point *outside* thereof, * * *" (emphasis supplied)

Thus energy transmitted from a point in one state to a point in another and then back to a point in the first state, where it is consumed, is not "transmitted in interstate commerce" within the purview of the Act. *Re Chicago District Electric Generating Corporation*, Federal Power Commission Opinion No. 63, 39 P. U. R. (NS) 263. But no one will deny that there has been "interstate transmission" of such energy.

In determining its policy as to federal regulation, and the relationship between federal and state regulation, Congress certainly is not to be baffled and circumscribed by the accident that electric energy travels fast, or that transmitted energy is usually not stored; or that there is no process

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[18] We are not here even concerned with the constitutional power of states to regulate, in the absence of a Federal statute, commerce which has crossed a state line. If we were, the cases would seem to support the view that the interstate movement ends with delivery of the energy to the distributing company. *Public Utilities Commission* v. *Landon*, 249 U. S. 236; *Missouri* v. *Kansas Gas Co.* 265 U. S. 298; *South Carolina Power Co.* v. *South Carolina Tax Com.*, 52 F. 2d 515, aff'd 286 U. S. 525; 60 F. 2d 528, aff'd sub nomine *Broad River Power Co.* v. *Query*, 288 U. S. 148.

akin to breaking of an original package. Congress can draw the line wherever it desires to draw it, as shown by the definition in Section 201 (c) of the Act; and as Congress has done in the equally instantaneous movement of telephone and telegraph communications (Section 3(e) and 221 (b) of the Communications Act of 1934, 47 U. S. C. 153 (e), 221(b)); and has done with respect to the transportation of intoxicating liquors. (Webb-Kenyon Act, *supra*)

Reading together Sections 201 (a) and (b) and referring to the legislative history, it is not difficult to determine where Congress intended to draw the line between "transmission in interstate commerce" on the one hand, and "local distribution" or "transmission in intrastate commerce" on the other. Congress wanted to overcome the hiatus in regulation created by the decision in the *Attleboro* case. That hiatus would be overcome by providing for Federal regulation of transmission and sales of electric energy at wholesale in interstate commerce.

To make certain that Federal regulation would extend no farther, Section 201 (a) provides that "such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States." Neither the Company nor the Commission nor the Court below contends that a state commission is constitutionally disabled from regulating facilities owned and operated within a state for the sole purpose of local distribution. Those facilities, being "subject to regulation by the States," are consequently not intended, by Congress, to be included within the terms "(facilities for) transmission * * * and * * * sale of electric energy at wholesale in interstate commerce."

Applying this test of Congressional intent, rather than the Commission's test of physical fact, to the facilities in question, the result is obvious. All Company facilities in these districts are subject to state regulation. Consequently they are not facilities subject to regulation by the Commission. So applied, there will be no hiatus in regulation and there will be no Federal regulation of "those matters which are * * * subject to regulation by the States."

II.

The Company Is Not Now, and Has Not Been, Subject to the Jurisdiction of the Commission by Virtue of the Ownership and Operation of Facilities in the Groton District.

The Commission asserted jurisdiction over the Company by reason of its ownership and operation of facilities used in transmitting and selling electric energy at wholesale to the Borough of Groton, a portion of which energy was thereafter sold by the Borough to Fishers Island and transmitted outside the state.

The Borough of Groton is a municipal corporation. The Act expressly exempts from Commission regulation transactions with or by municipal corporations and hence, we submit, nothing in connection with the transmitting and wholesaling of electric energy to the Borough, or the Borough's later sale of electric energy to Fishers Island could and did subject the Company to Commission regulation. This point is fully discussed in the Company's brief herein, pages 38-40, and we will not repeat the discussion in this brief.

But however the Court may decide that point, it is submitted that the Groton situation should be disregarded because of the negligible amount of the Company's electric energy involved. Only about 1/5 of 1 per cent of all the energy generated and received by the Company throughout the State of Connecticut was transmitted out of the state because of this connection with the Borough of Groton.[17]

Here is a large state-wide electric utility company which, except for this insignificant amount of energy transmitted second-hand to New York, is generating or transmitting no energy for export from the state. Is it reasonable to suppose that Congress had in mind the extension of Federal jurisdiction to all of the facilities of such a company because of this trifling dribble of electric current across a

[17] No interstate transmission took place after February 28, 1941.

state line? If there was ever an occasion for application of the rule *de minimis non curat lex* to test the limits of Federal *statutory* jurisdiction, this is it.

We are not here concerned with the constitutional power of Congress to extend Federal regulation to such a case, but whether Congress intended to do so. It is for this reason that such cases as *National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601, 606; *Valvoline Oil Co.* v. *United States*, 308 U. S. 141, 147 (cited in the Commission's brief to the Court below), holding that Federal jurisdiction under the Commerce Clause is not dependant upon volume, are not applicable here. Where the question is the *intent* of Congress rather than the *power* of Congress, volume may become a very important consideration. As the Court said in the *Fainblatt* case, *supra*:

> "• • • The amount of the commerce regulated is of special significance only to the extent that Congress may be taken to have excluded commerce of small volume from the operation of its regulatory measure by express provision or fair implication."

The language of the Act read together, and its legislative history, certainly give rise to a "fair implication" that Congress did not intend to convert an intrastate utility into an interstate utility because of any such trivial circumstance as this.

The Commission, in its brief to the Court below, countered this *de minimis* argument with the assertion: "The company serving Fishers Island is as such entitled to the protection of Section 202(b), 205, 206, 207, and 306 of the Federal Power Act with relation to petitioner as though it were as powerful as petitioner."

Just what "protection" can the Commission give Fishers Island even assuming that the Company is a public utility subject to Commission jurisdiction and that Fishers Island is still receiving some of the Company's energy? The sales of energy by the Company to the Borough of Groton are expressly exempt under Section 201(f). The

sales of energy by the Borough to Fishers Island are likewise exempt under the same section. With all the accounting control in the world over the Company, how much good can that do to Fishers Island when the regulation of wholesale rates to and by this municipal corporation are exempt? Certainly the application of the *de minimis* rule is not going to deprive Fishers Island of any protection it would otherwise receive.

The Court below appeared to recognize the validity of the *de minimis* rule in determining the extent of Federal statutory jurisdiction, saying:

> "We do not believe Congress intended that a large electric power system which was essentially *intrastate* in character should come under Federal jurisdiction because of some insignificant or temporary outside connection. * * *" (emphasis supplied)

Then the Court reached the conclusion that the character of the Company was essentially *interstate*. This conclusion was not based upon the relatively inconsequential connections in the four districts discussed in this brief, but because the Company, prior to passage of the Act, had been a member of the Connecticut Valley Power Exchange and had withdrawn from this interstate power pool to avoid Federal regulation.

The Court's conclusion that membership in this power pool is evidence of its "essentially interstate character" is based upon a misconception of the facts. As pointed out in the Company's brief (pages 40-42), the power received from this pool was a comparatively unimportant part of its statewide business. But aside from this, it seems wholly inadmissible that the status of an electric company as a "public utility" subject to Federal regulation, is to be determined by circumstances no longer in existence when the Act became effective. The Commission's power extends only over facilities "which transmit energy actually moving in interstate commerce." *Jersey Central Power Co.* v. *Federal Power Commission, supra.* The fact that the Com-

pany's facilities did at one time, prior to the act, transmit energy moving in interstate commerce is obviously immaterial.

The Court below seems to feel that the Company should be penalized because it purposely terminated its connection with the interstate power pool to avoid Federal regulation. But the Commission itself has held that the Act does not require a company to continue ownership or operation of the facilities which make it a "public utility". *Re Twin State Gas & Electric Company, Federal Power Commission* opinion No. 44, 33 P. U. R. (NS) 39. And this Court has announced the rule that no criticism is justly to be made because a person takes steps to escape regulation or taxation. In *Superior Oil Co.* v. *Mississippi*, 280 U. S. 390, it was said:

> "The only purpose of the vendor here was to escape taxation. It was not taxed in Louisiana, and hoped not to be in Mississippi. The fact that it desired to evade the law, as it is called, is immaterial, because the very meaning of a line in the law is that you intentionally may go as close to it as you can, if you do not pass it."

We submit that application should be given to the *de minimis* rule in this case and that the Company should not be held to be a "public utility" because of the ownership and operation of facilities over which a minor fraction of one percent of the Company's energy found its way across a state line.

CONCLUSION.

It can not be too strongly emphasized that no question of Federal power is presented here. This case, as with *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349, 355, "presents the narrow question of what Congress did, not what it could do." The extension of federal control into traditionally local domains is a "delicate exercise of legislative policy in achieving a wise accommodation between the needs of central control and the lively maintenance of local

institutions." *Palmer* v. *Massachusetts*, 308 U. S. 79, 84. This Court has insisted on a "suitable regard to the principle that whenever the federal power is exerted within what would otherwise be the domain of state power, the justification of the exercise of the federal power must clearly appear." *Florida* v. *United States*, 282 U. S. 194, 211. And, as said in *City of Yonkers* v. *United States*, 320 U. S. 685:

> "* * * Where a federal agency is authorized to invoke an overriding federal power except in certain prescribed situations and then to leave the problem to traditional state control, the existence of federal authority to act should appear affirmatively and not rest on inference alone."

That the Connecticut Public Utilities Commission has both constitutional and statutory power to regulate every phase of the Company's utility operations is not questioned. That allowance of Federal Power Commission jurisdiction over the Company's accounting practices will produce overlapping Federal-State regulation, cannot be denied. That such overlapping regulation, in this case where the state is fully competent to act, violates the declaration of policy (Section 201(a)) that Federal regulation is "to extend only to those matters which are not subject to regulation by the States", is obvious.

We ask that the writ be granted, to the end that the erroneous construction of the Federal Power Act by the Court below may be corrected and the erroneous judgment based thereon may be reversed.

Respectfully submitted,

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